THE EVOLVING LAW ON THE EUROBANK-CUSTOMER RELATIONSHIP AND THE COMMON LAW: THE NEED FOR CLARITY

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INTRODUCTION

The eurocurrency market is a market for intermediated funds where eurobanks acting as intermediaries, place themselves between the depositors of funds and the ultimate users of those funds. Like most financial markets, the eurocurrency market has a credit and a deposit side. There are two aspects to the deposit side of the eurocurrency market, which is the subject matter of this article: (1) the market dealing primarily with the deposit of short-term funds by depositors and the lending of those funds to the final users or borrowers, and (2) the market dealing with the interbank placement of funds where commercial banks borrow, lend, or trade eurocurrency among themselves. The operation of the eurocurrency market gives rise to legal relationships between eurobanks, their customers and other intermediary banks that may be different from the traditional banker-customer relationship. This article discusses the nature and operation of the eurocurrency market and how the legal consequences of the eurobank customer relationship are different from the domestic banker-customer relationship. It argues that there is a need for a redefinition of the common law on the banker-customer relationship.

I. THE PARTICIPANTS IN THE EUROCURRENCY DEPOSIT OPERATION

Eurocurrency deposit operations involve the placing and taking of deposits. The transactions are essentially loan transactions. The owners of the funds place the funds in banks or lend these funds while the depository banks take or accept the funds thus placed with them. A typical eurocurrency deposit[1] operation will therefore usually involve four groups

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1. Although one reference is usually made to the eurocurrency deposit, from the legal point of view, there are two aspects of the transaction. The transaction is broken down into (1) the traditional deposit arrangement and (2) a separate loan transaction. The separate loan transaction is between the depositor as the lender of the funds and the bank as the borrower. The loan agreement will specify certain terms including (1) the currency; (2) the place of payment; (3) the duration of the deposit; (4) the rates of interest; and (5) the currency and place of repayment. *See* D. Urech, *Elements of Contractual Law in Euromoney Dealings*, 1 J. INT'L BANKING LAW 14 (1998), *available at* 2004 WL UK-JLR 4644056; D. CARREAU, INTERNATIONAL CONTRACTS: LEGAL ASPECTS OF INTERNATIONAL

of participants: the original depositors, who in relation to the bank, are also lenders of the funds; the depository banks; other intermediary banks in the interbank market; and the final users of the funds.[2]

A. The Depositors

It is possible to group the initial depositors of eurocurrency funds into three categories: official institutions such as government and quasi-government bodies, central banks and other depositors of funds, which are neither government nor financial institutions. This latter group includes international corporations and individuals.[3] These initial depositors of funds enter the market in a number of ways and for a variety of reasons. Official institutions such as governments, government bodies and central banks may enter the market directly as suppliers of funds when they deposit a portion of their national reserves of a particular currency in eurobanks. The rationale for entering the market in this manner could include the desire to earn higher yields than would be possible in their own commercial banks.

Central banks may also supply funds indirectly through the use of swap arrangements. In this case, the central banks will sell foreign currency to their national commercial banks with the understanding that the concerned commercial banks will use those funds to procure foreign currency assets, reduce their liabilities and finance international trade. The central banks will then repurchase the currency at a later date. In most cases where such swap arrangements are used, the rationale is to further national monetary policy by controlling domestic monetary conditions and short-term capital flows.

Commercial banks constitute the institutional core of the eurocurrency market. Although primarily concerned with their role as intermediaries, commercial banks, nevertheless, contribute to the supply of eurocurrency. They may purchase foreign currency and then place these funds in the market, or they may use such funds to finance the

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DEPOSIT CONTRACTS 147 (Hans Smit, et al. eds., Matthew Bender 1981); and PAUL EINZIG, THE EURO-DOLLAR SYSTEM 11 (St. Martin's Press, 5th ed. 1973).

2. The Eurocurrency deposit operation involves only three groups of participants. *See e.g.*, E. WAYNE CLENDENNING, THE EURO-DOLLAR MARKET 16 (Clarendon Press, 1970). These commentators prefer to group both the depository banks and the other intermediary banks in the interbank market into the same category. *Id.* While this approach may be appropriate as a form of classification, it would seem more appropriate, for the purpose achieving clarity in the subsequent analysis of the mechanics of Eurocurrency deposit and interbank placement operations, to adopt the approach used in this work.

3. CLENDENNING, *supra* note 2, at 44; MARCIA STIGUM, THE MONEY MARKET 46-47 (Dow Jones-Irwin 3d ed. 1990).

international trade of their customers. When acting as financial intermediaries, commercial banks contribute also to the supply of eurocurrency by engaging in deposit expansion, that is the process of placing funds deposited with them in the interbank market.

Institutions such as private corporations, as well as individuals engaged in international business, may also supply eurocurrency when they deposit their receipts in banks outside the country of issue of the currency involved. Such individuals and corporations may possess extensive reserves of foreign currency outside their own countries as proceeds from international trade. They may prefer to hold such deposits in foreign currency for a variety of reasons. First, they would prefer to hold the currency in banks outside the country of issue and their own countries because of the higher rates offered. Other reasons could also include the relative convenience of holding that particular currency as against others and the cost involved in exchanging the currency for local currency.

B. The Depository Banks

The other participants in the offshore currency deposit and placement operation, are the commercial banks, acting as depository institutions and, in most cases, also playing an important role as financial intermediaries. When the intermediary (depository) bank takes or accepts funds it may do any of three things: (1) it may lend the deposit directly to borrowers, assuming that borrowers who have immediate needs for a loan in that currency exist; (2) it may seek an outlet for the funds by placing them in the interbank market; and (3) it may use the funds to meet its own liquidity requirements.

C. The Intermediary Banks

The other participants in the offshore currency deposit and placement process are the intermediary banks in the interbank market. Although it is possible to regard such banks as belonging in the same category as the initial depository institutions, the functions that the interbank market performs in the eurocurrency market, requires their separate consideration. The eurocurrency market is primarily an interbank market where the initial deposit or placement of funds is passed from bank to bank under the process of deposit expansion. At one end of the chain of transactions is the initial depository bank and at the other end may be the final users of the funds. Inbetween these two participants may be a chain of other intermediary commercial banks who take the deposits and loan the funds at narrow margins to other banks.[4] Interbank eurocurrency trading is conducted both between eurocurrency centers and within eurocurrency centers.[5] Both forms of interbank trading fulfil specific functions.

Trading within a eurocurrency center promotes liquidity smoothing, liquidity transfer and currency transfer.[6] Liquidity smoothing involves the process where banks seek to manage the structure of their assets and liabilities and reduce transaction costs. This is usually achieved by the transmutation of assets during the process of financial intermediation. The transmutation of assets takes place when the eurobanks, by placing funds in the interbank market, are able not only to invest in claims of the final users and tailor such claims to meet the user's needs, but also are able to change the form of these claims. They then issue liabilities on themselves, tailored to meet the maturity and liquidity needs of the initial depositors or investors. Liquidity transfer is the transfer of liquidity from one bank to another, reflecting the reality that not all banks are able to attract funds from primary sources. Finally, currency transfer involves the process where the eurobanks are enabled to match the currency composition of their assets through the use of the interbank market, and thus avoid foreign exchange exposure.

Interbank trading between centers, on the other hand, promotes global liquidity distribution. Global liquidity distribution, in simple terms, is the process of using the interbank market to normalize the demand and supply of funds in individual local markets and to reduce transaction costs that would otherwise prevail in transactions between banks of different jurisdictions. The main function of the interbank market is, thus, to reduce the risk inherent in the operation of the eurocurrency market, by spreading such risk among a number of commercial banks according to the degree of risk that the particular bank is prepared to accept.

D. The Borrowers: Final Users of Eurocurrency Deposits

The final users of funds placed in the eurocurrency market include official institutions, commercial banks, other financial institutions, and individuals. Since most of these users of the funds may employ the funds borrowed in any number of ways, it is difficult to determine in precise terms the exact range of final users. Although official institutions play an important role as suppliers of eurocurrency, they are relatively small users of such funds as compared to other users. In most cases, official users

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4. The mechanics of the interbank placement transaction are considered later in the article.
5. EUGENE SARVER, THE EUROCURRENCY MARKET HANDBOOK 204 (Prentice Hall 1988).
6. ANDREAS HAINDL, THE EURO MONEY MARKET 47 (Paul Haupt 1991).

such as governments and quasi-government instrumentalities, take funds in the form of loans and, depending on the amount involved, the loan may take the form of syndicated eurocurrency credits.

The predominant users of the funds deposited in the offshore currency market are commercial banks. As has been observed above, commercial banks make a great deal of use of the interbank market in the process of intermediation. Although commercial banks may channel funds to other users, the offshore currency market also serves the liquidity needs of the commercial banks.

Other private sector users of eurocurrency are international firms and individuals. In all these cases, the users of eurocurrency may incur different kinds of liability to the financial intermediaries. For example, while a sovereign borrower may take the funds in the form of a syndicated loan, corporations may prefer to issue notes or commercial paper in exchange for the funds.

II. THE MECHANICS OF THE EUROCURRENCY DEPOSIT

In the process of moving funds from the initial depositors of the funds to the ultimate users, intermediary banks rely on the services of correspondent banks as well as on those of electronic funds transfer mechanisms. It is thus appropriate to discuss the role of correspondent banks in attempting the electronic funds transfer process before an examination of the mechanics of the placement process.

A. The Role of Correspondent Banks

It is important to distinguish correspondent banking from the financial intermediation of commercial banks engaged in eurocurrency placements, both of which take place in the interbank market. Financial intermediation is the process where financial intermediaries, in most cases banks, but which could also include brokerage houses, place themselves between the suppliers of the funds and the users of those funds. More often than not, financial intermediation in the interbank market takes place as an integral part of the interbank offshore currency placement process.

Correspondent banking may also take place in the interbank market, as part of the offshore currency deposit and placement process. This is usually the situation where an initial deposit is placed in the interbank market by a depository bank, as opposed to being loaned directly to a borrower. However, this is the only similarity between the two concepts. Correspondent banking refers to the system of "reciprocal bank accounts between participating institutions"[7] created to facilitate receipts and payment in foreign currency.[8] Although correspondent banking also occurs in the domestic context, this section of this article is concerned with correspondent banking in the operation of eurocurrency deposits. In international banking, in general, it is usual for domestic banks with substantial international affairs to open accounts in their names with banks overseas, through and into which payments of foreign currency may be made or received. These correspondent accounts are referred to as *nostro* and *vostro* accounts, primarily in Europe,[9] or *due from* and *due to* accounts respectively in North America.[10] *Nostro* account means our account maintained at another institution, while *vostro* account means your account with us.

Thus if X Bank, located in the U.S., has deposits of dollars with Y Bank in the United Kingdom, the *nostro* or *due from* account of X Bank will reflect the amount of dollars on deposit with its United Kingdom correspondent Y Bank.[11] Likewise, from the perspective of Y Bank, the *vostro* or *due to* account of X Bank, will reflect the amount of U.S. dollars that the correspondent of Y Bank, X Bank, maintains with it.[12] The process of correspondent banking is facilitated by the use of automated or electronic fund transfer systems, by means of which the accounts of the respective banks are debited or credited.

B. The Role of Electronic Funds Transfer Systems

The eurocurrency market works essentially through a network of telecommunication lines that link various eurocurrency centers and banks. Although there are other methods of funds transfer, such as the use of airmail, bank checks and drafts, a large percentage of international interbank eurocurrency transfers are effected electronically.[13] This is so for several reasons. First, the eurocurrency market being a wholesale market deals in large quantities in funds, with relatively short-term maturities. It is thus expedient to use a mode of fund transfer that

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7. CARREAU, *supra* note 1, at 157.

8. DONALD I. BAKER AND RONALD E. BRANDEL, THE LAW OF ELECTRONIC FUNDS TRANSFERS 29-2(Warren et al. eds., 1988).

9. STIGUM, *supra* note 3, at 202.

10. *Id.*

11. *See generally* BAKER AND BRANDEL, *supra* note 8.

12. *Id.*

13. *Banking Technology: The Interbank Networks*, EUROMONEY 128 (1987); *see also* BENJAMIN GEVA, THE LAW OF ELECTRONIC FUNDS TRANSFERS (1992) [hereinafter GEVA LAW OF EFT].

combines speed with security.[14] Secondly, because eurocurrency transactions usually involve parties separated from each other by long distances, it is necessary to use electronic transfer systems to bring them closer together. Furthermore, because eurocurrency are funds denominated in currency held on the books of banks outside the country of issue, except those eurodollars held in international banking facilities in the United States, the financial institutions concerned do not have access to those currencies with which they deal.[15] This creates the need for correspondent banks, which may have direct access to those funds, and the need to link such institutions to facilitate transactions. The role of electronic funds transfer systems is, thus, to link financial institutions separated by time and space, to facilitate international financial transactions. The majority of international funds transfers are processed by two main organizations, depending on whether the funds transfer involves the U.S. dollar or some other currency. These two organizations are the Society for Worldwide Interbank Financial Telecommunications (SWIFT)[16] and the Clearing House Interbank Payments System (CHIPS).[17] While SWIFT is an international communications network for all currencies, CHIPS is a department of the New York Clearing House Association and is therefore, the private clearing system for only U.S. dollars.[18]

SWIFT is not a funds transfer system, but facilitates the transfer of

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14. Benjamin Geva, *International Funds Transfers: Performances by Wire Payment*, 4 BANKING AND FINANCE L. REV., at 113-14. (1990)

15. Urech, *supra* note 1, at 16; CARREAU, *supra* note 1, at 148.

16. SWIFT, a non-profit cooperative company organized under Belgian law, was founded in 1973 by 239 European, American and Canadian banks and is currently owned by about 1,650 member banks. Each year the members of SWIFT elect a board of directors, which in turn chooses a general manager, vested with the authority to make decisions concerning the use of the facilities of SWIFT. Membership of SWIFT is open to organizations engaged in the business of banking and in the transmission of financial messages. Currently, the facilities of SWIFT are used by over 2,600 financial institutions in over 65 countries. For other discussion of SWIFT and related aspects of its operations, *see generally* Ezra U. Byler and James C. Baker, *SWIFT: A Fast Method to Facilitate International Financial Transactions* 17 J. WORLD TRADE L. 485 (1983); Jeffery S. Tallackson & Norma Vallejo, *International Commercial Wire Transfers: The Lack of Standards* 11 N. C. J. INT'L L. & COM. REG. 639 (1986); John S. Santa Lucia, *Losses from International Electronic Funds Transfers: Time to Unify the Law* (1988) 8 NW. J. INT'L L. & BUS. 759 (1988); Herbert F. Lingl, *Risk Allocation in International Interbank Electronic Funds Transfers: Chips and SWIFT* 22 HARV. INT'L. L. J. 621 (1981); GEVA LAW OF EFT, *supra* note 13, § 4-35.

17. *See also* Deborah S. Prutzman, *Chips and the Proposed Uniform New Payments Code* 10 RUTGERS COMPUTER & TECH. L. J 1 (1983); GEVA LAW OF EFT, *supra* note 13, at ch. 3.

18. Benjamin Geva, *CHIPS Transfer of Funds* 4 J. INT'L BANKING L. 208 (1987); *see also* GEVA LAW OF EFT, *supra* note 13, § 3-23.

funds through the provision of a reliable and fast telecommunications network for transmitting messages concerning funds.[19] Since the primary purpose of SWIFT is to transmit messages for its members, the members of SWIFT use its network not only to transmit messages concerning funds transfer in a variety of currencies but also for other operations including debit and credit advices, statements, foreign exchange operations and money market confirmations, collections, documentary credits, interbank securities trading and balance reporting. In the context of the transmission of payment messages, the actual settlement of payment between the banks is effected by debits and credits to accounts of those banks or to correspondent bank accounts.[20]

CHIPS is a department of the New York Clearing House Association and is the international private clearing system for large dollar transfers. This means that all wholesale international transactions involving the use of the dollar go through CHIPS.[21] CHIPS, is thus, a settlement as well as a communications network.[22] Since the CHIPS network is the clearing system for euro-dollar transactions, its role is limited to transmitting payment messages concerning dollar transactions between payor-sending-bank participants and payee-receiving-bank participants in the New York interbank payments system. Almost invariably therefore, a transaction or payments message that originates outside the New York Interbank Payments System and involves the use of dollars, originates as a SWIFT message, and is eventually settled in New York via CHIPS.

C. The Eurocurrency Deposit Operation

With the above discussion about correspondent banking and the electronic funds transfer system that facilitates eurocurrency depositing as a background, it is now possible to examine the nature of a typical eurocurrency deposit and placement transaction and to examine the legal relationships that arise in such a transaction. A typical situation of the deposit and transfer of funds denominated in U.S. dollars in the eurocurrency market could take place in the following manner. Assume

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19. Geva, *supra* note 14, at 116; GEVA LAW OF EFT, *supra* note 13, § 4-35.

20. Geva, *supra* note 14, at 112.

21. SARVER, *supra* note 5, at 207; LINGL, *supra* note 16, at 626; GEVA LAW OF EFT, *supra* note 13, § 3-23. Theoretically, transfers of dollars could also pass through another U.S. wire transfer system—FEDWIRE. It is the Federal Reserve System's national electronic communications network. While CHIPS makes available same day funds, FEDWIRE provides immediately available Federal Reserve funds. Although no restrictions are imposed by either CHIPS or FEDWIRE on the kinds of payment transmitted via either system, in practice FEDWIRE attracts securities transactions while CHIPS attracts foreign exchange transactions.

22. GEVA LAW OF EFT, *supra* note 13, § 3-23, ¶3.03.

the following facts: a fictitious Kingdom of Peruvia has a central bank called Peruvia National Bank. Peruvia National Bank maintains an account with a U.S.–based Bank (Citizens Bank), into which it receives payment in US dollars. The current balance of Peruvia National Bank's account with Citizens Bank now stands at $10 million. Assume that the government and directors of the Peruvia National Bank decide that instead of letting the funds sit idle in the U.S. bank they could be transferred into a euro-dollar account in the United Kingdom at an advantageous rate of interest and Peruvia concludes a deal with the relevant U.K. bank (Abbey Bank). As discussed previously, the method of operating offshore currency deposits in general and eurocurrency deposits, creates a distinction between (1) the deposit of funds by depositors who are the lenders of the funds and (2) the interbank placement or bank-to-bank trading of deposited funds. This distinction influences the nature of the current practice in the operation of eurocurrency deposits. According to the current practice, when the eurocurrency depositor is a sophisticated customer, as opposed to a bank seeking to make an interbank placement, it is usual for the eurocurrency deposit to be formally documented pursuant to negotiations between such a customer and the depository eurobank. Depending on the negotiations between the eurobank and the customer, the documentation of the eurocurrency deposit may relate to any of the following: (1) time or fixed term deposit evidenced by a written contract; (2) a time or fixed term deposit evidenced by a certificate of deposit;[23] and (3) a call deposit or call money.[24] In the scenario used in this section the

23. For the purposes of withdrawal, bank deposits may be classified into (1) demand deposits and (2) time or fixed term deposits. While demand deposits may be withdrawn or transferred by a depositor without notice, time deposits may only be withdrawn at a specified future date or maturity date. Savings deposits are a kind of time deposit because, in general, the bank reserves the right to require notice before withdrawal. However, unlike time deposits evidenced by certificates of deposit and those evidenced by written contracts, which are interest bearing deposits with specific maturities, savings deposits do not have fixed maturities. Time or fixed term deposits have not always been evidenced by negotiable certificates of deposit (CDs), and currently may not always be so evidenced. Time deposits began to be evidenced by CDs when banks located in London, compelled by the desire to satisfy the demands of their customers for liquidity, began to issue dollar denominated CDs. Currently, CDs issued in the London money market are denominated in a variety of currencies, including Yen, Can$, Aus$, SDR, ECU, NZ$, Lire, N.Kr., and D.Kr. *See generally*, LONDON CODE OF CONDUCT: FOR PRINCIPALS AND BROKING FIRMS IN THE WHOLESALE MARKETS 20 (1992) [hereinafter LONDON CODE OF CONDUCT]. There is no universally accepted format for time or fixed term deposits evidenced by written contract and each bank adopts its own unique contractual format and documentation.

24. *See* STIGUM, *supra* note 3, at 225 (explaining that a substantial amount of funds placed in offshore accounts take the form of call money. Call accounts may be same day value, 2-day notice and 7-day notice accounts.. Call money is more attractive to various investors because of its comparative liquidity when compared with time or fixed term deposits. Although a time or

relevant negotiations and transfer of funds by Citizens Bank on behalf of Peruvia National Bank to Abbey Bank may give rise to a variety of formally documented deposit contracts, which are in reality loan contracts. The depositor concerned (Peruvia National Bank) is the lender of the funds, while the depository institution (Abbey Bank) is the borrower. The eurocurrency deposit in question may be (1) a time or fixed term deposit evidenced by a written contract; (2) a time deposit evidenced by a certificate of deposit; and (3) a call deposit or call money. A time or fixed term deposit, must be distinguished from a call deposit or call money.

While a fixed term deposit or time deposit is an interest bearing deposit with a specific maturity, a call deposit does not have any specific maturity. Call money is so called because it is said to be "on call," that is it is left on deposit without any specific maturity date and is withdraw-able usually on a day's notice. Where a time or fixed term deposit is evidenced by a written contract, the written contract, which specifies the terms of the contract, constitutes an acceptance by the bank of the terms of the loan negotiated. The terms of the time deposit contract[25] will usually include (1) the currency of account; (2) the duration of the deposit; (3) the interest rate; (4) the date of the deal; (5) the value and maturity dates; (6) the amount of interest; (7) the place of repayment; and (8) the payment mechanisms and processes. According to current practice, call deposits are neither evidenced by formal documentation nor standardized confirmations. The documentation of call accounts are, the statements that are sent by the depository bank, upon request via SWIFT, to the depositor.[26] Call deposits are not formally documented, that being the fastest moving sector of the interbank deposit market, the issuance and safekeeping of formal documentation becomes too cumbersome, if not too expensive. In the above scenario, if the deposit of "Peruvia National Bank" is a call deposit, "Abbey Bank" will send only a statement to "Peruvia National Bank" upon request from the latter.

In concrete terms, the above euro-dollar deal will take place in the following manner: assuming Abbey Bank has no correspondent relationship with Citizens Bank, but has a correspondent relationship with another U.S. bank called National Bank, the transfer may be effected with

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fixed term deposit bears a higher rate of interest, withdrawal prior to maturity attracts a penalty).

25. For some banks, for example, the Channel Islands Branch of the Royal Bank of Canada, the time or fixed term deposit contract is also referred to as a Fixed Term Deposit Confirmation. Despite its name, this is the only documentation which a depositor of funds receives, showing the amount of funds held at a eurobank. According to market practice then, this documentation, although referred to as a confirmation, constitutes a fixed term contract.

26. *See generally* Edmund M. A. Kwaw, GREY AREAS IN EUROCURRENCY DEPOSITS AND PLACEMENTS: TOWARDS AN INTERNATIONAL LEGAL REGIME (1990).

the services of the correspondent bank. Following instructions from Abbey Bank, Citizens Bank will effect a transfer via CHIPS to National Bank for the correspondent account of Abbey Bank.[27]

Upon receipt of the transfer message National Bank will, in turn, credit the *vostro* account of Abbey Bank. National Bank will then effect a transfer message to Abbey Bank using a funds transfer media such as SWIFT. Upon receipt of the transfer message, Abbey Bank will credit the account of Peruvia National Bank with the amount of $10 million and it will credit its *nostro* account with National Bank.

According to current practice, a necessary and final safeguard against the possibility of dealing errors is provided by the exchange of confirmations between the various participants.[28] In our present scenario, a confirmation will be sent to Peruvia National Bank by Abbey Bank showing the funds deposited with the latter. In general, a confirmation sent by a receiving bank (Abbey Bank) to the depositor (Peruvia National Bank), does not constitute an acknowledgment of funds received by the receiving bank (Abbey Bank), but only an agreement concerning the interbank placement of the funds to be received. The terms negotiated between Peruvia National Bank and the receiving bank (Abbey Bank), as documented on the confirmation form, only become effective upon the receipt of the funds by the receiving bank.[29] With respect to interbank placements, the confirmation sent to the transmitting bank is usually the only documentation concerning the placement of funds, which the bank receives. Such a confirmation, is thus, considered to be a contract between the banks concerned.

Where the fixed term or time deposit is not evidenced by a certificate of deposit, a fixed term/time deposit contract or term deposit confirmation is sent to the depositor by the eurobank. This is also the only documentation showing funds held at the eurobank, which the depositor receives from the eurobank. Upon the receipt of funds by the receiving bank then, the confirmation, in addition to being (1) a confirmation of the transfer and (2) an acceptance by the receiving bank of the terms, is also (3) a fixed term deposit contract, or time deposit contract. Although a reference is being made to the receipt of funds, the actual specie in dollars, is not actually received by the receiving bank in the U.K. The term,

27. If Abbey Bank has a correspondent relationship with Citizens Bank, the transfer operation will take place in the same bank, that is, by an in-house transfer.

28. *London Code of Conduct: For Principals and Brokering Firms in the Wholesale Markets,* FINANCIAL SERVICES AUTHORITY, 8, at ¶¶ 70-72 (1999), available at http:/www.fsa.gov.uk (last visited on Oct. 20, 2004).

29. Some confirmations will have a stipulation to that effect.

receipt of funds, denotes the process through which a credit to the *vostro* account of the receiving bank, Abbey Bank, and a corresponding credit to the accounts of Citizens Bank and National Bank at the Federal Reserve produce a payment to Abbey Bank.

As a result of the above transactions, specific accounting entries will be made in this manner. The books of Abbey Bank will show a credit in favor of Peruvia National Bank to the tune of $10 million and a corresponding liability on its own part. In the books of National Bank, the *vostro,* or *due to* account of Abbey Bank will be credited with the amount of $10 million. The books of Citizens Bank will show a debit of the same amount with respect to the account of Peruvia National Bank. The book entries made with Abbey Bank in the U.K. thus, reflect the corresponding entries made in the books of its correspondent, National Bank, in the U.S. This, in turn, reflects the changing nature of the claims involved. They are therefore, not independent accounts and have sometimes been referred to as mirror accounts.[30]

By giving up its claim against Citizens Bank, Peruvia National Bank now acquires a claim against a U.K. bank, Abbey Bank. Likewise, the original claim held by Peruvia National Bank against Citizens Bank now becomes a claim of the U.K. bank—Abbey Bank—against the U.S. bank, National Bank. Payment or settlement as between the two U.S. banks, Citizens Bank and National Bank, will usually be effected by the transfer of funds from and to accounts that both banks maintain with the federal reserve.

Thus, although Peruvia National Bank regards itself as holding dollars in Abbey Bank in the United Kingdom, the funds, which are the subject matter of the deposit and transfer operation, never leave the United States. Because Abbey Bank possesses a correspondent account with National Bank in the U.S., a transfer from the Federal Reserve account of Citizens Bank to that of National Bank at the Federal Reserve Bank in New York, moves the funds from Citizens Bank in the U.S. to Abbey Bank in the United Kingdom. It is this kind of transfer operation that some writers have in mind when they argue that, in the funds transfer process, the funds (in this case dollars) never leave the country of issue.[31] The scenario involving Peruvia National Bank is intended to illustrate what has come to be accepted as the usual practice of the eurodollar deposit operation in particular and eurocurrency operations in general.[32]

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30. CARREAU, *supra* note 1, at 160.

31. STIGUM, *supra* note 3, at 200; HAINDL, *supra* note 6, at 50.

32. Roy M. Goode, *Concepts of Payment in Relation to the Expropriation or Freezing of Bank Deposits*, J.I.B.L., 82-83, (2) (1987); *see also* Marco A. Jagmeti, *Money and Payment* 9

1. The Deposit Repayment Process

The repayment of a eurocurrency deposit may be effected in two main ways. The first way of repaying a eurocurrency deposit is with the use of "in-house" or correspondent bank transfers.[33] The second method is to effect payment via the country of issue of the currency that is the subject matter of the deposit contract.

i. Repayment by In-House Transfers

An in-house transfer generally refers to the transfer of funds between accounts held at either the same branch of a bank or at different branches of the same bank. Where two parties, A and B, maintain accounts at the same branch and A wants to make payment to B, an in-house transfer may be used to effect payment. The bank concerned merely debits the account of A and credits the account of B. In the international context, the use of an in-house transfer to effect payment may take place with or without the intermediary assistance of a correspondent bank. Assume that Peruvia National Bank, in the scenario used above, wishes to be repaid its $10 million held at Abbey Bank in the U.K., an in-house transfer, without the assistance of a correspondent bank, could be used to effect payment. This is possible where both Abbey Bank and Peruvia National Bank have correspondent account relationships with the same bank. Suppose both Peruvia National Bank and Abbey Bank maintain accounts with another bank in France called Banque Internationale. All that is necessary to repay the deposit of Peruvia National Bank, is for Abbey Bank to debit the account of Peruvia National Bank and then instruct Banque Internationale to transfer the funds from its account into that of Peruvia National Bank. Banque Internationale will then debit the *vostro* account of Abbey Bank and credit the *vostro* account of Peruvia National Bank. The transfer of funds between accounts maintained at the same bank is the in-house transfer.

ii. Repayment by Correspondent Bank Transfers

In the international context, where the concerned banks or parties do not maintain an account with the same branch of a bank, the services of a correspondent bank are usually required to facilitate the transfer of funds from payor to payee at the different banks. Correspondent banking refers to the system of reciprocal bank account relationships between banks.

INT'L BUS. L., 95 (1981); Kwaw, *supra* note 26.

33. Hal Scott, *Where are the Eurodollars?—Offshore Funds Transfers* 3 BANKING AND FIN. L. REV. XX 282-86 (1988-89).

Although correspondent banking is also used in the domestic context, in the international context it facilitates receipts and payments of foreign currency. In a very simple correspondent bank transfer, a sending or originating bank, upon the receipt of instructions from its customer, will effect a transfer message to another bank (the receiving bank) to make payment to a payee who maintains an account at the receiving bank. Payment, as between the sending or originating bank and the receiving bank, is effected by corresponding debit and credit entries to correspondent accounts maintained with each other. This usually means that the originating or sending bank must have sufficient funds in its correspondent account with the receiving bank to cover the amount of the transfer.

In international banking transactions and eurocurrency transactions for that matter, correspondent banks may be used to transfer funds either to and from (1) parties who hold funds with banks outside countries of issue or (2) parties who hold funds with banks inside countries of issue. In the latter situation, this usually involves the use of the clearing and settlement system of the country of issue.

iii. Repayment via the Clearing System of the Country of Issue

The repayment of eurocurrency does not have to pass through the clearing and settlement system of the country of issue where in-house and correspondent bank transfers are used. However, this is the current practice. When a eurobank accepts a deposit denominated in the currency of another country it undertakes certain obligations, including the obligation to repay, which in most cases is carried out by causing acts that take place in the country of issue of the currency concerned.[34] This is because, as a general rule, most payment obligations involving the delivery and collection of eurocurrency take place in the country of issue according to the rules of its clearing system. In the scenario used above, the repayment obligation of Abbey Bank, located in the U.K., although capable of being performed outside the U.S. in the manner described above, will, according to current practice, be performed in the U.S. This will be done by the delivery and collection of dollars in National Bank or another bank in the U.S. nominated by the customer, Peruvia National Bank.

Since repayments of eurocurrency are so frequently made through the country of issue of the currency concerned, as opposed to the use of in-

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34. *See* Goode, *supra* note 32; Jagmeti, *supra* note 32; CARREAU, *supra* note 1, at 161-63; Edmund M. A. Kwaw, *Determining the Proper Law to Govern the Eurocurrency Deposit Contract* 18 QUEEN'S L. J. 440, 445 (1993).

house and correspondent bank transfers, it is possible to argue that it is an implied term of eurocurrency deposit contracts that repayments are to be made via the clearing and settlement system of the country of issue.[35] This is also dictated by practical considerations.

Only a globally organized system for clearing and netting large sums in a variety of currencies, will lead to an efficient functioning of the repayments process.[36] Since no such organization exists, all payments of eurocurrency have to go through the only systems which currently possesses the facilities for collecting and netting large sums of foreign currency: the clearing systems of the countries of issue.[37] This is purely practical, given that (1) central banks of the countries of issue of various major currencies are the only ones which will accept the responsibility for supplying unlimited quantities of that currency and (2) these central banks are committed only to their own clearing banks.

Unlike the domestic banking context then, in the eurocurrency deposit context there are three stages in the repayment process, namely (1) the demand for payment; (2) the preparation by the offshore bank to effect payment; and (3) actual payment, that is, the delivery of funds by a bank in the country of issue. While all three stages may take place in the same bank in the domestic context, only the first two stages take place at the eurobank in the eurocurrency deposit context. Thus, in the above scenario, when Peruvia National Bank wishes to be repaid its deposit, it will make a demand to be repaid in the U.K. at the branch of Abbey Bank where the deposit is maintained. Since Abbey Bank does not have access to the funds, it can only instruct its correspondent in the country of issue to make the relevant transfer to the account of Peruvia National Bank, against a promise by Abbey Bank to subsequently provide cover.[38] Abbey Bank consequently sends a transfer message for that purpose. This is the second stage in the process of repaying eurocurrency or what this work refers to as the preparation to make repayment. The third stage, the actual delivery of the funds: payment per se, although capable of avoiding the clearing system of the U.S., as explained above, will, in most cases, take place in the U.S. The account of Peruvia National Bank is then credited and the corresponding debits and credits are effected in the accounts of Citizens Bank and National Bank at the Federal Reserve Bank.

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35. Goode, *supra* note 32.

36. CARREAU, *supra* note 1, at 161; *see also* JOHN E. HOFFMAN, JR., THE IRANIAN ASSETS LITIGATION, IN PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1980, 350 (Martha L. Landwehr. Ed., Matthew Bender 1980).

37. CARREAU, *supra* note 1, at 161; Hoffman, *supra* note 36, at 350.

38. Urech, *supra* note 1, at 16.

2. *The Interbank Placement Operation*

As observed at the beginning of this chapter, the deposit side of the eurocurrency market also includes the bank-to-bank deposit of funds, or the interbank placement. The mechanics of the interbank placement process may be described using the hypothetical eurocurrency deposit operation discussed above. Using this scenario then, assuming that Abbey Bank, after receiving the deposit of Peruvia National Bank does not want the funds to sit idle on its books in the U.K., it may decide to place it in the interbank market by depositing it with another eurobank in France (Banque Internationale). This assumes that Banque Internationale is prepared to pay a higher rate for the funds. If Banque Internationale also cannot find immediate use for the funds deposited with it, it will also deposit it in the interbank market. At each stage in this interbank placement process, the next bank pays a slightly higher rate than the previous bank does. The margins involved in the interbank market are usually very small. It is important to note, that the redepositing of the funds in the interbank market, does not add to the final extension of credit in the financial markets, but only involves the passing of funds from bank to bank.

The mechanics of the interbank placement operation involving some or all of the above parties could take place in the following manner. Abbey Bank will contact Banque Internationale over the phone and request the latter to provide it with its bid or deposit rates for deposits of various maturities in both France and England. Assuming the rate available in the Paris branch of Banque Internationale is higher, Abbey Bank will negotiate with Banque Internationale (Paris) to place the $10 million for example, for one month, in the Paris branch of the latter bank. After an agreement is reached, the relevant book entries are made. If Banque Internationale also cannot find immediate use for the funds, it may also decide to deposit it with its London branch, which may decide to take the deposit on its books at approximately 1/32 of 1 per cent over the rate paid by the Paris branch. In this case the second funds placement takes place between two branches of the same bank.

i. The Role of Brokerage Firms

The above interbank placement operations could also take place with the assistance of brokerage firms. For example, if the London branch of Banque Internationale decides to invest the $10 million deposited with it at a profit, it may seek to lend the funds at as high a rate as possible. The use of a brokerage firm becomes indispensable in this context. Since it is generally difficult to find the appropriate bank, willing to pay the appropriate rate, brokers, who possess a comparative advantage in the possession of the relevant information, act as intermediaries between banks in the interbank market. Thus, the London branch of Banque Internationale may request a brokerage firm to provide it with the bid or deposit rates offered by various banks for call, 7-day, 30-day, 90-day,180-day and 270-day deposits, denominated in a variety of currencies. On this basis, the London branch of Banque Internationale is able to make an informed decision as to whether it wants to place the funds or swap currencies. Assuming it decides to place the funds at a bank in Japan, Sumitomo Bank, it will convey this decision to the broker. The broker will then contact the eurocurrency dealing department of Sumitomo Bank by phone or telex, to close the deal. The broker earns a fee of about 1/32 of 1 per cent. Confirmation of the deal is transmitted to the London branch of Banque Internationale and the message to transfer funds to the Japanese bank, is transmitted via SWIFT, to correspondent banks in Japan, which then effect the transfer.

As already noted above, as between banks, the interbank placement of eurocurrency is not formally documented, only confirmations are sent between the parties. Thus, while the deposit contract between Peruvia National Bank and Abbey Bank may be formally evidenced by a certificate of deposit or a fixed term deposit contract, the interbank placement operations between Abbey Bank and Banque Internationale in Paris, or that between Banque Internationale in London and Sumitomo Bank in Japan, are not evidenced by formal contractual documents but by mere entries on the books of the banks concerned. All transactions are carried out informally via the telephone, telex or fax and confirmations of the deal are exchanged. Confirmations of financial deals may also be made by telephone, in writing or using other electronic media.

Although there is no standardized format for such confirmations, for banks operating in the London wholesale markets, the *London Code of Conduct*[39] recommends that all such confirmations sent by banks and other financial institutions engaged in wholesale market deals, include all the details of the transaction concerned.[40] The current practice, however, is, that banks participating in the international money markets usually include their own terms and conditions of trading, in addition to the details of the deal, on such confirmations. According to a Royal Bank of Canada (RBC) standing order, for example, offshore branches of the RBC in issuing confirmations of deposit deals (whether by telephone or in

39. *London Code of Conduct: For Principals and Brokering Firms in the Wholesale Markets*, *supra* note 28, at 8-9.
40. *Id.* at 9.

writing), must include details including; (1) the banks full name and address, including telephone and fax numbers; (2) the type of transaction; (3) the counterparty's full name and address; (4) the amounts and currencies involved; (5) the value and maturity dates; (6) the interest rates agreed upon, including the basis of calculation, that is, whether 360 or 365 days; and (7) details concerning payment.[41] It is therefore reasonable to infer that Sumitomo Bank will send a confirmation to the London branch of Banque Internationale containing similar terms.[42] As mentioned before, since such written confirmations are the only documents showing monies held at the other banks, which the banks placing the funds will receive, such confirmations are regarded as contracts according to market practice.

III. The Legal Relationships

The deposit and placement of eurocurrency, and the process of making payments via electronic funds transfers, gives rise to legal relationships between the involved participants. These relationships include that between the: (1) depositary bank and the customer; (2) depositary bank and the correspondent bank; (3) customer and the correspondent bank; and (4) beneficiary/destination bank and the payee. Although these same legal relationships could occur in the domestic context, the legal significance of these relationships differs in the eurobanking context.

A. *The Relationship Between Customer and Eurobank*

In the eurobanking context, the relationship between the customer and the eurobank can be divided into two stages, namely the depositary relationship and the funds transfer relationship. The depositary relationship is concerned with the opening of the eurocurrency account and the subsequent transfer of funds into that account. Whereas the funds transfer relationship is concerned with the transfer of funds from the account into another account specified by the customer.

1. *The depositary relationship*

Similar to the deposit relationship in the domestic context, the legal

41. *Royal Bank of Canada: Standing Order No. 8.05, Deal Confirmations Revised 1992*, Royal Bank of Canada, London [hereinafter *RBC Standing Order No. 8.05*].

42. It is the current practice for the Royal Bank of Canada located in London, for example, to treat telephone confirmations as only temporary. Telephone confirmations, according to *RBC Standing Order No. 8.05*, are to be recorded and kept until all transactions are paper confirmed and settlement effected. Written confirmations are also to be kept until matching confirmations are received from the other bank.

character of the depositary relationship in the eurobanking context is that of a contract and falls within the general common law rules regarding ordinary accounts in the banker-customer relationship.[43] Like the relationship between the banker and the customer regarding ordinary or general deposits in the common law, the relationship between the depositary eurobank and the customer commences immediately when both parties begin negotiations and enter into a relationship that is to be part of the eventual contract.[44] Generally, negotiations that do not result in any agreement, cannot establish a relationship.[45]

The contractual depositary relationship between the eurobank and the customer, like the ordinary banker-customer deposit relationship, consists of reciprocal rights and duties that are founded on the practices and usages of domestic banking as well as the eurocurrency market. The classic statement of the nature of the reciprocal rights and duties of a depositing customer and bank, in the domestic context, is that of Atkin L.J. in *Joachimson* v. *Swiss Bank Corporation.*[46] According to Atkin, in the domestic context, when a customer deposits money with a bank,

> [t]he bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the *branch of the bank where the account is kept*, and during banking hours. . .The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate a forgery. *I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept.* (emphasis added)

Thus, in both the traditional domestic banker customer deposit

43. It is very important to observe that there are varieties of banker-customer relationships. For instance, the relationship between the bank and its customer when the bank provides financial advice is considered to be fiduciary. Where a customer places personal property in a bank for safe keeping, the relationship becomes one of bailment. *See* MARGARET H. OGILVIE CANADIAN BANKING LAW 435 (Carwell 2d ed. 1998); *Foley v. Hill* , 9 Eng. Rep. 1002 (1848); *Burnt v. Westminster Bank Ltd.*, 1 Q.B. 742, 3 All E.R. 81 (1965.).

44. MARK HAPGOOD PAGET'S LAW OF BANKING 161 (Butterworths, 11th ed. 1996); ROSS CRANSTON, PRINCIPLES OF BANKING LAW 139-41 (Clarendon Press, 1997).

45. *Id.*

46. *Joachimson v. Swiss Bank Corp.*, 3 K.B. 110, (Eng. C.A. 1921).

relationship and the eurobanking relationship, the legal character of the contractual relationship between the bank and its customer is that of debtor and creditor. The depositor is the creditor and the bank is the debtor.[47] The deposit is a loan, and in the absence of any special agreement that qualifies the relationship,[48] the deposit becomes the property of the bank.[49] In this traditional relationship the bank is not the bailee of the customer and does not hold the money in any fiduciary capacity. The legal title to the funds passes to the bank,[50] which has the right to mix it with other funds and to use as it sees fit. A liability in favor of the depositor is thus created. Since title to the money passes to the bank until demand is made, the bank cannot be said to have a lien on such funds that it owns.[51]

This is where the similarity ends between the domestic deposit relationship and the eurobanking relationship. The traditional common law rules and the approach of the eurobanking system differ when it comes to the repayment of the deposit by the bank.

2. The problem of repayment and the place of repayment

Lord Atkin's well cited dictum provides that the promise of a bank to repay funds held on deposit is to do so at the branch of the bank where the account is kept. This approach of Lord Atkin with respect to the repayment obligation of a bank is based on an idea, derived from the era of

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47. *Joachimson*, 3 K.B. at 110; *Foley*, 9 Eng. Rep. at 1002; *R. v. Davenport*, 1 All E.R. 602 (Crim. App. 1954); *Laing v. Bank of New South Wales*, 69 W.N 318 (N.S.W.S. Ct. 1952). Although the High Court decision in *Laing* was reversed by the Privy Council, it was not with respect to the nature of the banker customer relationship. *See generally New York County Nat'l Bank v. Massey*, 192 U.S. 138 (1904); United States v. First Nat'l City Bank 321 F. 2d 15 (2nd Cir. 1963); *Royal Bank of Canada v. Boyce*, [1996], 57 D.L.R. 683; *Bank of Ottawa v. Hood* [1908], 42 S.C.R. 231; *Everly v. Dunkley* [1912], 27 O.L.R. 414 (relevant U.S. and Canadian decisions).

48. Deposits made with banks could be divided into two classes: special deposits and general deposits. With special deposits, the bank becomes the bailee of the customer and title to the money still remains with the customer. It has been held for instance that a deposit of money or property merely for safe keeping, is a special deposit. Such a special deposit may be in a safe deposit box or otherwise kept separately. The only determining criteria seems to be whether the depositor intended that the funds are (1) for a specific purpose not contemplating a credit to a general account; (2) to be segregated; and (3) to be returned intact on demand. With general deposits, the money is deposited in accordance with normal banking customs. The depositor, for his/her own convenience, parts with title to the money and lends it to the bank. The bank in consideration of the loan of the money and the right to use it as it sees fit, agrees to refund the money either in whole or in part, upon demand. *Foley*, 2 H.L. 28, 9 Eng. Rep. 1002 (1848); *Royal Trust Co. v. Molsons Bank* [1912] D.L.R. 478.

49. *Foley*, 2 H.L. 28, 9 Eng. Rep. 1002 (1848); *Royal Trust Co.* [1912] D.L.R. 478.

50. *See Davenport* 1 All E.R. 602 (Crim. App. 1954).

51. *See Liberty Sav. Assoc. v. Sun Bank*, 572 F.2d 591 (7th Cir. 1978); 5A MICHIE ON BANKS AND BANKING 37 (Matthew Bender & Co., Inc. et. Al. eds., 2003).

the goldsmiths and the use of currency and coins in modern times, that money on deposit is specie or cash that has a *situs* or location. Where money is specie or cash held by a branch of a bank where a customer has an account it makes sense that the customer has to make a demand at that branch for repayment of his or her deposit.[52] The traditional common law approach to repayment is limited when it is applied to the eurocurrency market.

As indicated above, when a customer such as Peruvia National Bank transfers funds from its account with Citizens bank in the United States into a eurodollar account with Abbey Bank in the United Kingdom no transfer, in the sense of a transfer of specie or cash, takes place. The obligation of Citizens Bank is not assigned to Abbey Bank. What happens is that upon the transfer of funds from Citizens Bank to Abbey Bank, the obligation of Citizens Bank to pay is notionally extinguished and is replaced by the obligation of Abbey Bank to pay the same amount that is transferred. However, because no transfer of cash or specie has actually taken place, Peruvia National Bank cannot obtain payment from Abbey Bank. It can demand payment from Abbey Bank, but because Abbey Bank, per se, has no funds, the only obligation of Abbey bank is to initiate the process that will result in Peruvia National Bank obtaining payment either via the clearing and settlement process in the United States or via in-house or correspondent bank transfers.

The shortcomings of the traditional common law respecting payment, as well as other matters, was exposed in *Bank Markhazi Iran* v. *Citibank,*[53] and *Libya Arab Foreign Bank* v. *Bankers Trust Co.*[54]

i.Bank Markhazi Iran v. Citibank

In *Bank Makhazi Iran* v. *Citibank*, President Carter of the United States, pursuant to the *International Emergency Economic Powers Act,*[55]

52. For an extensive discussion of the origins of the concept of payment *see* PAUL EINZIG PRIMITIVE MONEY (2d ed., Pergamon Press 1966) (1949); Kwaw, *supra* note 26, at § 6; *Redefining the Concept of Payment,* 2 CANADIAN J. INT'L BUS. L. & POLICY 199 (1997); F.A. MANN, THE LEGAL ASPECT OF MONEY (Clarendon Press, 5th ed. 1992); Benjamin Geva, *From Commodity to Currency in Ancient History: On commerce Tyranny and the Modern Law of Money*, 25 OSGOODE HALL L. J. 115 (1987).

53. Writ dated 30 November 1979, *Bank Markazi Iran v. Citibank*, N.A., No. 1979-B-5903 (Q.B.).

54. *Libya Arab Foreign Bank v. Bankers Trust Co.*, 1 Lloyd's Rep. 259 (Q.B. Comm. Ct. 1987).

55. 50 U.S.C. § 1702 (2003). The statute, where relevant states as follows: Sec. 1702(a)(1) At times and to the extent specified in § 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—(A) investigate, regulate, or prohibit—(i) any transactions in foreign exchange, (ii) transfers of credit

imposed a freeze on the worldwide assets of the Government of Iran in response to the seizure of the U.S. embassy in Tehran, and the capture of hostages found in the compound, as well as the perceived threat to international world order posed by the Iranian regime.[56] At the time of the freeze order, Iranian assets that were subject to the freeze order, were in the region of $6 billion and were held at the London branches of U.S. banks. These assets collectively belonged to Bank Markazi Iran

In November 1979, Bank Markhazi Iran, seeking to challenge the legality of the freeze order, commenced an action in London against the U.S. banks. The statement of claim of Bank Markhazi Iran, among other things, stated that (1) the defendant was indebted to Bank Markazi Iran for certain amounts in U.S. dollars, money which was held on account for Bank Markazi Iran at the London branch of the defendant, and (2) Bank Markazi Iran also owed payments of interest which had been demanded but had not been repaid.[57]

In their pleadings, Citibank, as well as the other defendant banks, put forward various arguments that they said justified their refusal to pay. One of these arguments is important for this article. Citibank argued that payment could not be made because of the freeze order, which explicitly referred to assets held by U.S. persons overseas. Citibank further argued, that even if the court in London held that the freeze order was void in the U.K., the order still made it illegal for the U.S. banks to make payment. The defendant also argued that it was well known to the depositor, Bank Markhazi Iran, that no payments could be made *per se* in London without the transfers going through the New York clearing system. Therefore, any payment made would immediately be subject to the freeze order. Payment to Bank Markhazi Iran was therefore impossible. In making this argument, the defendants in this case thus, sought to draw a distinction between the repayment of an ordinary domestic deposit, and the repayment of a eurocurrency deposit. Unlike a domestic deposit, Bank Markhazi Iran's

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or payments between, by, through or to any banking institution to the extent that such transfers or payments involve any interests of any foreign country or national thereof . . . (B) investigate, regulate, direct and compel, nullify, void, prevent, or prohibit any acquisition, holding withholding, use, transfer, withdrawal, transportation, importation, exportation of, or dealing in . . . any property in which any foreign country or national thereof has an interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.

56. Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks and National Laws*, 64 N.Y.U L. REV. 733, 747 (1989). In 1979, a period of 10 days after the hostage incident in Teheran, the president issued an executive order, blocking any official assets of Iran subject to the jurisdiction of the United States, or which came into the possession of persons who were subject to the jurisdiction of the United States.

57. *Id.* at 750, citing n. 54: Writ dated 30 Nov. 1979, *Bank Markazi Iran*, N.A., No. 1979-B-5903 (Q.B.) (on file at N.Y.U. L. REV.).

deposit could not be repaid where the account was held.

The case never went to trial, thus it is difficult to determine if the Court would have redefined the repayment obligation of banks, and held that Bank Markhazi Iran had to be repaid in the United States, or whether it would have adhered to the traditional approach. Both French and English courts denied summary judgement and commissioned groups of experts to look into the issues raised and set dates for trial. However, all suits were subsequently abandoned when the hostages were released as a result of the *Algiers Accords* of January 19, 1981.[58] The issue of whether the Courts will recognize the developing eurobanking reality and modify or move away from the well known dictum of Lord Atkin and redefine the law on repayment or, on the other hand, adhere to the traditional approach, was answered somewhat in *Libya Arab Foreign Bank* v. *Bankers Trust Co.* This case is also important because it also raised other issues regarding the adequacy of the common law on the banker customer relationship.

ii.Libyan Arab Foreign Bank. v. Citibank

Libyan Arab Foreign Bank v. *Citibank* also involved the imposition of a freeze, pursuant to an Executive Order[59] issued by President Ronald Reagan, on the assets of Libya by the United States of America. At the time of the freeze, Libyan Arab Foreign Bank, was wholly owned by the Central Bank of Libya, and had a substantial amount of funds on deposit with Bankers Trust Co., a U.S. bank, in London and in New York.

The relationship between Libyan Arab Foreign Bank and Bankers Trust Co. began in July 1972, when Libyan Arab Foreign Bank appointed Bankers Trust Co. of New York as its correspondent bank on a reciprocal basis.[60] Libyan Arab Foreign Bank later opened a eurodollar account with

58. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 18, 1981, 20 I.L.M. 223 (entered into force Jan. 19, 1981). Under the accords, the Iranian assets that stood on the books of the overseas branches of the U.S. banks together with interest payments were to be transferred into an escrow account with the Bank of England. This account was to be in the name of the Algerian Central Bank. The funds were then to be released to Iran upon the safe departure of the hostages.

59. *See* Exec. Order No. 12, 544, 51 Fed. Reg.,1235, (Jan. 8, 1986). The Order imposed a freeze on all Libyan government owned property in the U.S., or "within the possession or control of U.S. persons, including overseas branches of U.S. persons." *See also* Exec. Order No. 12, 543, 51 Fed. Reg. 873 (Jan. 7, 1986). There was also another executive order issued by the president before this one. Under this first executive order, all imports into the United States of goods of Libyan origin and exports of goods to Libya, were prohibited. Also prohibited by this first executive order was the provision of credit by U.S. persons to Libya.

60. Mahvash Alerasool, *Extraterritorial Powers: Libya's Frozen Assets and the Question of the External Application of the Freeze Order*, 18 INT'L CURRENCY REV. 12, 14 (1987).

Bankers Trust Co. in Paris that same year. In April 1973, Libya Arab Foreign Bank opened a 7-day notice account with Bankers Trust Co. in London into which it transferred the balance of the Paris account that it had closed.[61] In December 1973, Libyan Arab Foreign Bank also closed its Bankers Trust Co.–New York Account and transferred the balance to its Bankers Trust Co.–London account.[62] The eurodollar account that Libyan Arab Foreign Bank held with Bankers Trust in London was an interest bearing account which was used for its day to day operations as well as for investment purposes.[63] In November 1977, Bankers Trust Co. became dissatisfied with the profit earning potential of the London account and operating difficulties. Bankers Trust Co. therefore, proposed the use of a "managed account system" to manage the affairs of Libyan Arab Foreign Bank. This was comprised of a current account to be maintained at Bankers Trust Co.–New York and a call account to be maintained at Bankers Trust Co.–London.

An agreement was reached in December 1980 under which Libyan Arab Foreign Bank would open a demand account in New York with a minimum balance of $500,000 and a call account in London. The Bankers Trust Co. -New York account was to be a non-interest bearing account and the daily account operations of Libyan Arab Foreign Bank were shifted to New York. Under this managed account system, all transactions were to pass through New York. Pursuant to this, Bankers Trust installed a cash connector in the Libya office of Libyan Arab Foreign Bank that enabled the latter to have direct access to computerized accounts held in Bankers Trust Co.–New York. All credit and debit instructions were to be sent via this cash connector to Bankers Trust Co.–New York where the transactions would be effected.[64] Under the agreement, at 9 a.m. each banking day, Bankers Trust Co. was required to determine the closing balance for the previous day with respect to the New York account. When the balance was in excess of $500,000, the excess was to be transferred to the London account. The transfer was to be in such multiples of $100,000 as would leave a maximum balance of $599,000 in the New York account.[65] If the balance in the New York account fell below $500,000, it was agreed that a compensating transfer was to be made from the London account.

Two days before the imposition of the U.S. freeze order, Bankers

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61. *Libya Arab Foreign Bank v. Bankers Trust Co.*, 1987 Q.B. 728, 734 (U.K.).
62. Alerasool, *supra* note 60, at 15.
63. *Id.*
64. *Libyan Arab Foreign Bank*, 1987 Q.B. at 735.
65. *Id.* at 737.

Trust Co. failed to transfer funds from New York to the London account pursuant to the managed account arrangement. At the time of the freeze order on January 8th, 1986, the balance in the London account was $131 million and the balance in the New York account, was $161 million in excess of the stipulated $500,000 maximum balance.

After the freeze was imposed, Libya Arab Foreign Bank made various attempts to secure repayment. First, on April 28, 1986, it sent a telex to Bankers Trust Co.-London demanding repayment of the balance.[66] A similar telex was also sent to Bankers Trust Co.-New York demanding payment of the $161 million that had been frozen in New York. Bankers Trust Co., in response, sent a telex refusing both demands for payment.[67]

Libya Arab Foreign Bank therefore, commenced legal action against Bankers Trust Co. in the High Court in London claiming, among other things: (1) payment of the $131 million from the London account; (2) payment of the $161 million from the US account which should have been transferred before the freeze; (3) payment of an amount of $1.8 million representing the back values of transfers from the New York account to the London account which Bankers Trust Co., between April 1984 and October 1986, had failed to effect; and (4) damages for non-payment of its payment instructions.

Bankers Trust Co., drawing a distinction between the repayment obligation in a domestic banking context and in a eurobanking context, advanced the argument that Libya Arab Foreign Bank could not demand payment in London because it was an express term of the arrangements with Libya Arab Foreign Bank that all payments would go through New York. Further, the nature of the repayment process of the eurodollar transaction required the performance of acts, namely the use of the clearing and settlement process in New York. Such acts would be illegal pursuant to the freeze order.

At first instance, Justice Evans observed that the correspondence which had taken place between Libya Arab Foreign Bank and Bankers

66. *Libya Arab Foreign Bank v. Bankers Trust Co.*, 1 Lloyd's Rep. 259, 268 (Q.B. 1988). The telex stated, "We hereby instruct you to pay to us at 10:30 am U.K. time on Thursday 1st May 1986 out of our U.S. dollar account number 025-13828 at Bankers Trust London, the sum of U.S. dollars $131 million. We make demand accordingly. This sum is to be paid to us in London at the said time and date, either by negotiable banker's draft in such amount (U.S. Dollars 131,000,000.00) drawn on Bankers Trust London, payable in London to ourselves (Libyan Arab Foreign Bank) or to our order. Alternatively we would accept payment in cash although we would prefer to be provided with a banker's draft as aforesaid."

67. *See* Alerasool, *supra* note 60, at 16. (The telex stated as follows: "We regret we are unable to comply because any such transfer and/or payment would be in contravention of the January 8th 1986 Presidential freeze covering your funds with us.").

Trust Co, in which it had been agreed that all transactions would pass through the New York account, was nothing more than an agreement to pass transactions through New York. By merely agreeing to pass funds through New York, Libya Arab Foreign Bank had not waived its right to deal with the London branch.[68] In the eyes of the court, the 1980 agreement was only concerned with three things: (1) the opening of the demand account in New York; (2) the setting up of the managed account procedures; and (3) the variation of the notice period for the London account. Based on this observation, Justice Evans saw no need to imply a term into the contract to the effect that Libya Arab Foreign Bank could no longer exercise its rights over the London account.[69]

Justice Evans also held that although the dollar obligations which took place in London were settled in the New York clearing system, this did not make New York the place of performance of the obligation of Bankers Trust Co. This was because the telex sent by Libya Arab Foreign Bank had clearly stated that payment was to be made in London, in cash.

This argument of the court seems to suggest that in the absence of any express stipulation in the form of a telex or any other documentation which varies a eurocurrency deposit contract, the place of settlement and clearing of the currency concerned would be the place of performance. The law of that place would then govern the performance of the payment obligation. In this respect, the argument of the court appears to make a hole in the traditional common law approach regarding the place of repayment. The place of repayment is seen as not being absolute, but is rather dependent on the facts of the case. Where there is some stipulation in the contract that some other place, and not the place where the account is kept is the place of repayment, then that stipulation will apply. According to the Court, however, since the place of repayment, as stated in the telex, was London, the place of ultimate settlement was irrelevant and there was no need for the court to make a choice between the traditional common law approach and the eurobanking approach. Consequently, the court held that the argument of Bankers Trust Co. that payment would be illegal had no basis.[70]

On October 16th, 1986, Justice Evans in the high court granted summary judgement in favour of Libya Arab Foreign Bank. He stated that although his decision might lead to Bankers Trust Co. suffering penalties in the U.S., his duty was to enforce the law of the United Kingdom as he

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68. *See Libyan Arab Foreign Bank* (order granting summary judgment) in *10* MIDDLE EAST CURRENCY REVIEW at 48 [hereinafter *Summary Judgment*].

69. *Id.* at 49.

70. *Summary Judgment*, *supra* note 68, at 50.

saw it to be. Bankers Trust Co. appealed the decision on the grounds that it should have been given unconditional leave to defend. In view of some important observations made by the Court of Appeal it is instructive to consider the decision of that court.[71]

Justice Kerr in giving the opinion of the Court of Appeal stated that the issues to be decided were as follows: (1) whether the London account was a eurodollar account and if so (2) what the obligations of the parties were with respect to that account. In particular, the court was concerned with determining (1) if the alleged practice that eurodollar transactions were cleared in the United States and made available there, amounted to a legally recognized usage and if not (2) whether Libya Arab Foreign Bank could demand payment in the manner it had requested. The other issue to be determined was (3) the proper law governing the London account.

The court stated that Bankers Trust Co. could only rely on the presidential orders as a defence if either U.S. law was the law governing the contractual relationship with regards to the London account or compliance with the demand for repayment required some act in New York which would be illegal there.

As the Court of Appeal saw it, the facts of the case revealed strong arguable issues that could only be decided at an ordinary trial. As Kerr L.J. observed, what Evans J. did in awarding summary judgement was conduct a "trial by affidavit" alone.[72] For example, on the issue of whether the London account was a eurodollar account and if so what the obligations of the parties were, the Court of Appeal held that Mr Justice Evans had based his decision on the premise that a bank account is located solely at the branch where it is kept. These made Evans J. conclude that Libya Arab Foreign Bank could only make a demand for payment and in particular, payment in cash at that branch.[73] For Kerr L.J., however, the rule that a bank account is payable at the branch, probably only applied to bank accounts denominated in local currency, and not large amounts of foreign currency.[74] Kerr L.J., therefore, considered the possibility that the common law place of repayment rule, while being applicable to accounts denominated in the currency of the jurisdiction where the bank is located, was inapplicable to foreign currency deposits.

Mustill L.J. also observed that it was very possible that the eurocurrency market had developed special customs and practices which

71. *See Libyan Arab Foreign Bank, reprinted in* 10 MIDDLE E. CURRENCY REV. at 39 [hereinafter *Court of Appeal Decision*].

72. *Court of Appeal Decision*, *supra* note 71, at 40.

73. *Id.* at 38.

74. *Id.*

made eurocurrency accounts different from ordinary accounts and which the court had to recognize. However, since this could only be decided after a full trial, the defendant, Bankers Trust Co., was allowed to appeal and given unconditional leave to defend the case. On remand the case came before Justice Staughton of the commercial court.

The argument advanced by Libya Arab Foreign Bank on remand varied only slightly from that advanced earlier. The most important of these claims, which is also the focus of this section, was the first claim for $131 million in the account in London. At the basis of this claim was the general issue of the nature of the London account—whether it could be called a eurodollar account—and rights and obligations of the parties with respect to that account.

This first claim of Libya Arab Foreign Bank for the $131 million in the London account was based on four basic propositions of the common law approach to the ordinary banker-customer relationship. These propositions are as follows: (1) the relationship between the banker and customer is that of debtor and creditor; (2) the bank is liable to pay the money owed the customer, on demand; (3) the customer is entitled to demand to be paid in legal tender; and (4) the customer has to make the demand at the branch where the account is kept. When these propositions were applied to the obligations of the parties with respect to the case at bar, it meant that (1) Bankers Trust Co. was the debtor of Libya Arab Foreign Bank; (2) Bankers Trust Co. had to pay the money it owed Libya Arab Foreign Bank on demand, a valid demand had been made by telex; (3) Libya Arab Foreign Bank was entitled to be paid in legal tender, hence the demand by telex to be paid in cash was valid; and (4) Libya Arab Foreign Bank had to make demand at the branch where the account was kept, which was London. Libya Arab Foreign Bank consequently argued that there was only one contract and it was governed by English law. Alternatively, there were two contracts with two proper laws. The contract with respect to the New York account was governed by New York law and the contract with respect to the London account remained governed by English law.[75]

The defendants, Bankers Trust Co., argued that the London account was a eurodollar account and was therefore subject to rules that were different from those applied in the ordinary banker-customer relationship. It also argued that after 1980, with the creation of the new account, the nature of the relationship changed: a new contract was created. After 1980, although there were two accounts in existence—the New York and

75. *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1 Lloyd's Rep. 259, 270 (Q.B. 1987).

London accounts—there was only one contract, and it was governed by U.S. law. This was because it had expressly been agreed between Bankers Trust Co. and Libya Arab Foreign Bank that all transactions would pass through New York. Since Libya Arab Foreign Bank had expressly agreed to the management of its accounts from New York, it was neither entitled to make a demand for payment in London, nor receive payment there. The corollary of this argument was that even if there had been no freeze order, it would still have been contrary to the terms of the contract for Libya Arab Foreign Bank to demand payment in London. Since the freeze order had made it illegal to effect payments in New York, payment, under any circumstances, could not be made.

This argument in defense, therefore, focused not so much on the legality, or otherwise, of the extraterritorial application of the freeze order, but on the nature of the contractual obligation itself, which it was argued, was expressly governed by U.S. law.

Bankers Trust Co. also argued that apart from the express term of the contract, there was also an implied term that the transfer of funds from London to New York would be made by way of a U.S. clearing system, to the credit of an account with a bank in the U.S. Such a bank or branch of a bank would be nominated by Libya Arab Foreign Bank. In other words, because of the nature of the usage of the eurodollar market and the course of dealing between the parties there was an implied term that in effecting transfers from London to New York only CHIPS or Fedwire would be employed.[76]

In arriving at a decision, Justice Staughton first considered the issue concerning the conflict of laws. Both Bankers Trust Co. and Libya Arab Foreign Bank did not dispute the general rule that had to be applied. According to the principles governing the choice of law in contracts with foreign elements, performance of a contract is excused if (1) it has become illegal by the proper law of the contract or (2) it necessarily involves doing an act that is illegal in the place of performance.[77] The court, as a threshold issue, then had to determine the proper law that governed the London contract after 1980.

3. *The Problem of the Proper Law*

As discussed above, the place where the account is kept is also the place of repayment under the common law. This approach is based on the notion that money on deposit is specie and has a particular location or

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76. *Libyan Arab Foreign Bank v. Banker's Trust Co.*, 1 Lloyd's Rep. at 277.

77. DICEY AND MORRIS: THE CONFLICT OF LAWS 1167 (Lawrence Collins ed., 11th ed., Stevens & Sons, London 1987).

situs. In the common law, the proper law of the traditional banker customer deposit contract is said to be the law of the place where the account is kept. This rule is based on the link between the place where the account is kept and the place of repayment in the traditional domestic context. However, when this rule is applied to the Eurocurrency context problems arise. This is because the place where the eurocurrecy deposit account is kept is not the usual place of repayment.

In *Libya Arab Foreign Bank* v. *Bankers Trust*, the Court was of the opinion that this traditional rule was applicable to the eurocurrency context. Mr. Justice Staughton held that one had to start from the first principle that in the absence of agreement to the contrary, the contract between banker and customer is governed by the law of the place where the account is kept. Therefore, the problem was to determine the place where the London account was kept. Although he observed that it was difficult to apply the analogy of an account being kept at a specific place to the case at bar,[78] he nevertheless went on to conclude that since the actual entries on the London account were made in London, the London account was kept in London at all material times. Thus, there were either two separate contracts or one contract with two proper laws. Mr. Justice Staughton however, preferred the idea of one contract governed in part by the law of New York and the law of England.[79] But as far as the obligations of the parties concerning the London account were concerned, Mr. Justice Staughton held that English law governed.[80]

Unlike the observation of Kerr L.J. in the Court of Appeal, Mr. Justice Staughton held that it would require overwhelming evidence before it could be asserted that the general principles, with respect to the choice of law rules in the banker-customer relationship, did not apply to the eurocurrency deposit relationship. For Mr. Justice Staughton then, the link between the place where the account is kept and the place of repayment (which is at the basis of the proper law rule) was applicable to the eurocurrency deposit in the case at bar. In other words, the place where the account was kept in the eurocurrency deposit operation, London, was the same as the place where repayment of the deposit was to take place.

4. *The Form of Payment*

Another issue that arose in the case was the form of payment. As explained earlier, since the common law considers money on deposit to be specie, unless an agreement to the contrary exists, the depositor is entitled

78. *Libyan Arab Foreign Bank v. Banker's Trust Co.,* 1 Lloyd's Rep. at 270.

79. *Id.*

80. *Id.* at 271.

to be repaid in specie. This is problematic in the eurobanking context, because the bank where the account is kept does not have access to specie, and the account is in the form of book entries only. The court in *Libyan Arab Foreign Bank* v. *Bankers' Trust*, went on to consider the kind of payment that Libyan Arab Foreign Bank was entitled to demand, which would not necessarily involve an illegal act in the U.S.

The primary line of defence of Bankers Trust Co. was that there was an express term in the contract after 1980 that mandated that payment be effected via New York. If there were such an express term, Libyan Arab Foreign Bank would not be entitled to demand payment in London and payment would have to pass through New York. In this event, payment would also be illegal. However, Mr. Justice Staughton held that the managed account arrangement, together with its express term, had been terminated by the telex sent by Libya Arab Foreign Bank demanding payment. After this termination, Libyan Arab Foreign Bank was within its rights to demand payment in London. Having resolved the issue of whether there was an express term concerning payment in New York, it was then necessary to determine if there was an implied term as advanced by Bankers Trust Co. The essence of Bankers Trust Co.'s defense based on the implied term, was that payment of eurodollars necessarily involved a clearing system in the U.S. This procedure—according to Bankers Trust Co.—was an integral part of the operation of eurocurrency deposits and was based on the fact that the dollars, which were the subject matter of the contract, were not available in England. Consequently, it would be impossible to effect payment in legal tender in London. Unlike a sterling deposit and deposits of small quantities of foreign currency, Bankers Trust Co. had no direct access to wholesale deposits of eurodollars, which were nothing more than book entries. This also meant that the parties could not have envisaged cash as a means of payment. In support of this position, Bankers Trust Co. submitted in evidence the written expert report of Dr. Marcia Stigum. The report of Dr. Marcia Stigum stated, among other things, that cash transactions are an insignificant part of the eurocurrency market and that the market is strictly a non-cash market.[81] Mr. Justice Staughton, after considering the evidence, observed that Bankers Trust Co. had failed to establish the existence of a usage in the market as well as a course of dealing between Libyan Arab Foreign Bank and Bankers Trust Co., which would justify implying a term that payment had to be made in New York, via the New York payments and clearing system. He nevertheless made it clear that it was possible that such a usage could be

81. *Libyan Arab Foreign Bank Banker's Trust Co.*, 1 Lloyd's Rep. at 278 (quoting the expert report of Dr Marcia Stigum).

established as regards time deposits that were traded between the dealing rooms of banks. This was not so with the case at bar.

Having rejected the existence of such a usage, the Court held that Libyan Arab Foreign Bank was entitled to payment in legal tender or cash (either dollars or sterling).[82] It was the opinion of Mr. Justice Staughton that apart from the problem of security and counting, there was no formidable difficulty in Bankers Trust Co. obtaining the equivalent of $131 million in sterling notes from the Bank of England. Bankers Trust Co. obtaining dollar bills would also pose no problems, and, in the view of the Court, the delivery of dollars from New York would not constitute performance per se, but merely preparation for performance.[83]

Thus, in this major decision by a court, involving the deposit side of the eurocurrency market, the common law rules regarding the banker-customer relationship were considered applicable to eurocurrency deposits without any modification or reformulation.

The decision leaves many unanswered questions. The Court argued that there was no implied or express term in the deposit agreement, that required payment to be effected in New York. In particular, the Court did not consider the method and place of repaying large dollar deposits that would constitute a usage. This implied that repayment of the eurocurrency deposit in the case at bar had to take place in London, although the bank did not have access to such large amounts of foreign currency. Indeed, the Court did not consider it relevant to give any consideration to the nature of the clearing system. The conclusion that may be derived from this case is that since, according to common law principles, a depositor of local currency has a right to demand repayment in cash a customer depositing foreign currency also has a right to be repaid in cash (irrespective of the quantity involved) in addition to other forms of payment.[84]

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82. *Libyan Arab Foreign Bank Banker's Trust Co.*, 1 Lloyd's Rep. at 281.

83. Anne Joyce, *Libyan Arab Foreign Bank v. Bankers Trust: Common Law Meets Its Limits?*, 29 HARV. INT'L L.J. 451, 461 (1988).

84. *See* Ross Cranston, *The Libyan Assets Case: Limits to Extraterritorial Claims*, 3 J. INT'L BANKING L. 177, 180 (1987) (in discussing other forms of repayment, Staughton drew a distinction between the correspondent transfer and the complex dollar account transfer. He argued that in a complex dollar transfer, a transfer in London would be reflected in the transformation of accounts held at the Federal Reserve or a correspondent account. Although this form of transfer involved an act in the U.S., it did not mean that payment was effected there). *See also* Hal Scott, *Where Are the Dollars? – Offshore Funds Transfers*, 3 BANKING & FIN. L. REV. 243-46 (1988-1989) (also agrees that payment of eurodollar deposits do not necessarily take place in the United States, but his reasons for this assertion are different. According to Professor Scott it is possible for payment of a eurodollar deposit to be effected by 'in-house' and correspondent bank transfers so that the payment system of the U.S. will not be involved).

Justice Staughton's observations reveal that the traditional proper law rule concerning deposit contracts may not be directly applicable to eurocurrency deposits. The observation that in some cases it may be possible to establish the existence of a usage concerning the repayment of eurocurrencies via the country of issue, suggests that the traditional approach may be modified. This is because since the proper law rule is based on the common law link between the place where the account is kept and the place of repayment, in those situations where the place of repayment is different from the place where the account entries are made, the basis for the rule collapses.

It is submitted, on the basis of the above analysis, that there is the need for a re-evaluation of the common law regarding the payment obligation of banks. The common law must take into consideration the modern reality. In this day and age of eurocurrency deposits and placement operations where an account is opened without the deposit or transfer of actual specie, the prevailing practice suggests the existence of an implied term that payment is made not where the account is maintained but in the country of issue of the currency concerned. Regretfully, the court in *Libyan Arab Foreign Bank* v. *Bankers Trust Co.*[85] missed a good opportunity to rethink the archaic common law approach to the banker customer relationship. For the court to say that in the absence of a statement to the contrary, a depositor of foreign currency of whatever amount has a right to demand payment in cash, because "every monetary obligation is to be fulfilled by the delivery of cash," is not in accordance with the reality.[86]

5. *The Funds Transfer RelationshipBbetween Eurobank and Customer*

The second stage in the relationship between the eurobank and the customer arises when the customer gives the eurobank a mandate to effect a transfer of funds. In the search for legal rules to govern funds transfers, courts in the past have relied on analogies from the common law rules regarding the collection and payment of cheques and other bills of exchange. One of these analogies concerns the law of agency as it applies to the collection and payment of bills of exchange.

In the ordinary common law banker customer relationship, it is generally accepted, that although the general character of the banker-customer relationship is that of a contract, this legal character is modified

85. *See Libyan Arab Foreign Bank v. Bankers Trust Co.*, 1 Lloyd's Rep. at 259.
86. *Id.* at 281.

and becomes one of agency when the bank undertakes certain transactions on behalf of its customer.[87] When the bank obtains a mandate from the customer to effect a transfer of funds from one ordinary account to another, the contractual relationship is modified and becomes one of agency. The reason is that in both credit and debit transfers,[88] as in the case of collecting negotiable instruments and effecting payment via the cheque clearing process, the bank is acting in a representative capacity on the instructions of its customer.[89] The customer is the principal in this agency relationship and the bank transferring the funds, the transmitting or originating bank, is the agent.

While it is generally accepted that the above common law principles also apply in the eurobaking context, courts have drawn a distinction between on the one hand, the process of transferring funds, which gives rise to a relationship of agency, and on the other, the instruction to transfer funds from the customer which does not give rise to any legal relationship. This distinction was drawn in *Royal Products* v. *Midland Bank.*[90]

In *Royal Products*, the Plaintiff, was a company that carried out its operations in Malta, and maintained bank accounts with Midland Bank in England, and National Bank and Bank of Industry Commerce and Agriculture (BICAL) both located in Malta. In November 1972, Royal Products wanted to transfer funds from its account with Midland Bank in England to National Bank in Malta. If the transfer was affected directly, Royal Products would have had to pay certain high fees. Royal Products thus, decided not to transfer the funds to National Bank, but rather to transfer the funds to BICAL and it instructed Midland Bank to transfer the

87. *See London Joint Stock Bank v. Macmillan and Arthur*, [1918] A.C. 777; *Austrlia & New Zealand Bank Ltd. v. Ateliers De Constructions Electriques De Charleroi*, [1967] 1 A.C. 86; Hapgood, *supra* note 44, at 407-35; Ogilvie, *supra* note 43, at 557.

88. A credit transfer is an order or instruction from the customer to its bank to transfer funds from the customer's account to the account of the payee, maintained either with the same bank or another bank. A credit transfer therefore, has the effect of pushing funds from the account of the payor-customer sending the payment order, to the beneficiary. A debit transfer, on the other hand, seeks to draw funds from one account into another account. Examples of debit transfers include (1) a direct debiting arrangement where the payee's bank is instructed by the payee-customer to obtain payments due to the payee from the payor's bank and (2) the use of a check.

89. *See* Richard King, *The Receiving Bank's Role in Credit Transfer Transactions*, 45 MOD. L. REV. 369 (1982); D.I. BAKER & R.E. BRANDEL, THE LAW OF ELECTRONIC FUNDS TRANSFERS chs. 29-11 (Warren, Gorham, and Lamont, 2nd ed. 1988); LORD CHORLEY & J. MILNES HOLDEN, LAW OF BANKING 266 (Sweet & Maxwell 1974); E.P. Ellinger, *The Giro System and Electronic Funds Transfers*, 2 LLOYD'S MAR. & COM. L.Q. 178, 195 (1986) (arguing that funds transfers are composed of a string of transactions in which the banks involved act in representative capacities).

90. *See Royal Products v. Midland Bank*, 2 Lloyd's Rep. 194 (Q.B. 1980).

funds to BICAL. Midland Bank, which had a correspondent relationship with National Bank in Malta, had on previous occasions arranged such a transfer directly with BICAL. However, on this occasion Midland Bank decided to affect the transfer through its correspondent relationship with National Bank. Midland thus instructed National Bank to transfer the requested funds from its *vostro* account to the account of Royal Products at BICAL. This instruction was given by telex. National Bank only became aware of the telex the following day, November 24. On that day, instead of immediately affecting the transfer, National Bank opened an internal suspense account in the name of BICAL and credited this account. The funds were transferred later. The following day BICAL ceased operations and the Central Bank of Malta took over its operations.

On November 27, upon determining that BICAL had ceased operating, Royal Products asked Midland Bank to amend the funds transfer instruction and not to transfer funds to BICAL but to National Bank. Following these instructions, Midland Bank instructed National Bank to retrieve the original remittance. National Bank advised Midland Bank that the transfer had already been affected on November 25 and that it could not be retrieved because BICAL was now under the control of the Central Bank of Malta, which had imposed restrictions on BICAL's operations. Midland Bank informed Royal Products of the situation and Royal Products commenced an action in England against Midland Bank.

Royal Products argued that: (1) they were entitled to be reimbursed their money because their instructions were never carried out; (2) Midland Bank owed it a duty in carrying out the funds transfer instructions and were in breach of this duty; and (3) National Bank, the third party, and Royal Products had a contractual relationship, and National Bank should have effected the transfer on the date that it received the order.

In determining whether Royal Products could recover its funds, the Court made certain statements respecting the legal character of the funds transfer order and the nature of the legal relationship that arises when a funds transfer order is given. According to the Court, a funds transfer order is nothing more than a mere instruction from the customer to the bank to affect a transfer. While the process of affecting the transfer could give rise to a legal relationship, such as an agency relationship, the transfer order itself did not give rise to any relationship between Royal Products and Midland Bank.

The Court held further, that Midland owed a duty to use care in carrying out the transfer and could be held to be vicariously liable for the conduct of its agents. However, the funds transfer instruction did not create any additional obligation on Midland Bank. The instruction merely required that Midland Bank affect a transfer, it did not preclude it from employing a specific method of transfer. Finally, the court also held that there was nothing in the instructions to affect the transfer that created privity of contract between Royal Products and the subagent, National Bank.

The decision exposes an inconsistency between, the traditional common law approach as laid down by Atkin L.J. in *Joachimson* v. *Swiss Bank*, including the relationship between a bank and its customer in the domestic context, versus, the relationship in the eurobanking context. In the domestic context banks are frequently required by clients to undertake certain activities, including crediting the account of other customers at the same bank or at other banks. The decision in *Joachimson* v. *Swiss Bank* makes it clear that the relationship between a bank and its customer is contractual. As part of the contract there is an obligation on the customer to "exercise reasonable care in executing written orders so as not to mislead the bank." The reason for this is that the written order or instruction binds the bank and it must act on the written order. The decision in *Royal Products* suggests, however, that when the customer gives a bank an instruction, for example, to credit the account of another customer, that instruction does not give rise to any legal relationship between the bank and the customer. In the eurobanking context then, a distinction is drawn between the funds transfer instruction, and the process of effecting the transfer. If there is any legal relationship, it arises only at the time that the eurobank proceeds to effect the transfer and not before.

Conceptually, it is difficult to see how one is able to sever the instruction of the customer from the totality of the contractual relationship that underpins the banker customer relationship, so that one is able to make the argument that the instruction of a customer to its bank, gives rise to no legal relationship. The decision clearly creates a need for clarity in the common law on the banker customer relationship.

i. Duties of the Originating Bank as an Agent

The relationship of agency in the credit transfer process imposes certain duties on the transmitting/originating bank. One of the most important duties that the transmitting bank owes to the customer is a duty to exercise care and skill in the process of transferring the funds. It is generally accepted that the standard that is imposed on the transmitting bank is the standard which is expected of a bank engaged in that business, according to current banking standards. This duty of care and skill may be divided into three facets: (1) the transferring bank must act in accordance with the mandate of its customer; (2) the transferring bank is obliged to employ the services of a reliable correspondent bank to effect the transfer where this is needed; and (3) the transferring bank must effect a timely transfer of the funds concerned.[91] This duty of care and skill is owed only to the sending customer and not to a stranger, or the payee.[92] The only time where an originating or paying bank will owe a duty to a payee is where the paying bank is also a receiving bank. In this context, the bank owes a duty in its capacity as a receiving bank. However, the case of *Henderson* v. *Merrett Syndicates Ltd.*[93] suggests that a paying or originating bank may owe a duty to a payee not only because it is also a receiving bank, but also because it assumed or took upon itself the responsibility of effecting the transfer on behalf of the payee. The case stands for the proposition that if a party assumes the responsibility of performing a task on behalf of another, then that party is liable in the event that its act or omissions result in damage to the other party.

6. *The Duty to Act in Accordance with the Customer's Mandate*

Under the law of agency, an agent is required to comply strictly with the instructions of its principal. This has been determined to mean that where the agent exceeds its authority or does not follow the mandate of its principal to the letter, the agent will not receive any reimbursement.[94] This is so even if the result of exceeding or going contrary to the principal's instructions is not detrimental to the principal. The corollary of this rule is that the principal's instructions, in this case the customer's instructions to the transferring bank, have to be unambiguous and clear. It has been held in some cases that where the mandate of the principal is ambiguous, the agent may use the ambiguity to justify its construction of the instructions.[95]

In the context of funds transfers, the originating or transmitting bank is under a duty to act in accordance with the customer's mandate. Failing to act in accordance with the customer's mandate is the general expression that encompasses a variety of situations in which the transferring bank

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91. *See Equitable Trust Co. v. Dawson*, 27 Lloyd's List L. Rep. 49 (H.L. 1926) (In the absence of a contractual disclaimer, the originating bank is held to be vicariously liable for the negligence or default of its correspondents).

92. This is especially relevant in those situations where the originating bank accepts a transfer order from a stranger, pursuant to an arrangement between the beneficiary bank and the originating bank that is intended to benefit the beneficiary or payee. The possibility of a stranger using a bank to affect a credit transfer to a payee at another bank is very likely in England where, after the Golden Memorandum of 1967, a person is able to effect payments into the account of another from any bank in the U.K. under the Giro system.

93. *Henderson v. Merrett Syndicates Ltd.*, 3 W.L.R. 761 (1994); *see also White v. Jones*, 2 W.L.R. 187 (1995).

94. *See Midland Bank v. Seymour*, 2 Lloyd's Rep. 147, 168 (Q.B. 1955).

95. *See Ireland v. Livingston*, [1872] 5 L.R. 395 (H.L.); *see also European Asian Bank v. Punjab & Sind Bank*, 1 Lloyd's Rep. 611, 617 (1983).

effects an incorrect transfer. This includes effecting a transfer to the wrong payee or beneficiary, including the situation where no transfer is authorized, and effecting a transfer to the correct payee, but in the wrong amount.

The current position seems to be that the rule regarding strict compliance by an agent with the instructions of its principal is modified in the funds transfer context. In *Royal Products* v. *Midland Bank*,[96] it was held that a transferring bank will not be held to be in breach of its mandate if, in following the instructions, it acts in accordance with the skill and manner generally accepted in the business of banking.[97]

i. The duty to engage a reliable correspondent bank

According to the law of agency, an agent may neither delegate its authority nor appoint a sub-agent to undertake any transaction on behalf of the principal, without the express or implied authority of the principal.[98] Then, prima facie, the transmitting (originating) bank, without the authority of the customer, may not engage any other bank to assist it in effecting the transfer. This general rule poses problems in those situations where the beneficiary-payee of a funds transfer order maintains an account at another bank with which the transmitting (originating) bank does not have a correspondent account. Where a beneficiary-payee of a funds transfer order maintains an account at either (1) a bank with which the transmitting (originating) bank has a correspondent relationship, or (2) another branch of the transmitting (originating) bank, then a direct transfer is possible. However, in those situations where neither of the above account arrangements exists, there is the need for an intermediary bank. The position seems to be that where there is the need to employ the services of a correspondent sub-agent, the transmitting (originating) bank will be deemed to have the implied authority of it's customer-principal to appoint the correspondent bank as its sub-agent for the purposes of affecting the transfer.[99] This is so for two reasons. First, the nature of the transaction is such that it cannot be carried out without the appointment of a sub-agent. This being so, it is possible to argue that the customer-principal intended that the transmitting (originating) bank should be able to delegate its authority.[100] Also, the employment of a sub-agent to assist

96. *See Royal Products v. Midland Bank*, 2 Lloyd's Rep. 194 (Q.B. 1980).

97. *Id.* at 194, 199.

98. *De Bussche v. Alt*, 8 Ch. D. 286 (1878).

99. *Quebec & Richmond Railway v. Quinn*, 14 E.L.R. 899 (1858); *see also Equitable Trust Co. of New York v. Dawson Partners Ltd.*, 25 Lloyd's List L. Rep. 90 (1926).

100. *De Bussche*, 8 Ch. D. 286 (1878).

the transmitting (originating) bank in effecting the transfer of funds is justified by the customs and usage of the eurocurrency market.

IV. THE RELATIONSHIP BETWEEN THE TRANSMITTING ORIGINATING BANK AND THE CORRESPONDENT BANK

Since the correspondent bank acts on the instructions of the transmitting (originating) bank, it is the agent of that bank. The rules discussed above, regarding the duties of skill and care of an agent, are also applicable here. The correspondent bank is under a duty to act in accordance with the mandate that is given to it by its principal, the transmitting (originating) bank, and to use such skill and care as would be expected of a comparable bank in such a situation.

A. The Relationship Between the Payor/Sending Customer and the Correspondent Bank

Regarding the relationship between the customer who initiates the funds transfer, and the intermediary correspondent bank, the general rule is that delegation does not create privity of contract between the principal and the sub-agent. Thus, so far as the issue of rights and liabilities is concerned, the payor (the principal) may only sue and be sued by the transferring-originating bank (the agent). Likewise, the sub-agent, the correspondent bank, may only sue and be sued by the agent-transmitting (originating) bank.[101]

This situation, where the transmitting (originating) bank delegates its authority to another intermediary bank because the nature of the transaction warrants it, needs to be differentiated from those situations where (1) a customer may employ a bank specifically for the purposes of creating an agency relationship between it and a third party, and (2) the agent undertakes to provide the customer with another agent as a substitute for itself. In these two situations, the customer's bank, in reality becomes *functus officio* when the third party is appointed an agent. In general then, whether privity of contract exists between the customer who initiates the funds transfer and the intermediary bank which is employed by the customer's bank to effect the transfer, will depend on the circumstances of the case and the intention of the customer (the principal). There are two U.S. cases which illustrate this exception to the general rule regarding privity, namely, *Silverstein* v. *Chartered Bank*,[102] and *Evra Corp.* v. *Swiss*

101. *Calico Printers Asso'n v. Barclays Bank,* 145 L.T. 51 (1931); *Schmaling v. Tonlinson,* 6 Taunt 147 (1815).

102. *Silverstein v. Chartered Bank* H.K., 392 N.Y.S.2d 296 (1977).

Bank.[103]

In *Silverstein*, the U.S. court was of the opinion that there was privity of contract between the payor-customer and the bank's correspondent because the correspondent had been expressly requested by the customer.

Evra Corp., involved an Illinois corporation, Evra Corp., that was engaged in shipping and the purchase and sale scrap metal. Evra Corp. entered into a charter under which it was required to pay approximately $1,825 per day as rent. The ship was to be used by Evra Corp. to deliver scrap metal to fulfil a prior contract with a Brazilian corporation. The charter provided that if Evra Corp. failed to make payment on time, the owner could withdraw the vessel. Payment was to be made by wire transfer through an Illinois bank, the Continental Illinois National Bank. Continental, to the Swiss account of the owners at Banque de Paris et des Pays-Bas (Suisse). To affect this transfer, Continental Illinois National Bank used Swiss Bank as its correspondent bank. For one payment, following a request from Evra Corp., Continental Illinois Bank sent a funds transfer order to its London branch for transmittal to Swiss Bank in Geneva. A telex operator at the London branch of Continental Illinois National Bank tried to reach Swiss Bank's general telex to provide it with the funds transfer instructions but did not succeed. The telex operator then sent another message to another telex number at Swiss Bank and received a confirmation that the message had been received. Unbeknownst to the telex operator, there was no paper in the telex machine to which the message had been sent, although the machine continued to receive messages. Consequently, Swiss Bank did not act on the funds transfer message and the funds were not paid into the account of the ship owners at the required time. The owners withdrew the Charter and Evra Corp. sued Swiss Bank alleging that Swiss Bank had breached its contract with it. Swiss Bank in defence argued that it owed no duty to Evra Corp. as it was a merely a correspondent bank and an agent of Continental Illinois National Bank. The Court held that Swiss Bank was liable to pay damages for breach of contract and negligence and that there was privity of contract between Evra Corp. and Swiss Bank. Although the decision was overturned, the decision on appeal turned on the issue of consequential damages. The dictum of the lower court with respect to privity between Evra Corp. and Swiss Bank was not discussed on appeal.

Thus, if the circumstances of a case suggest that the customer's bank was authorized to find a bank that would affect a transfer, as opposed to effecting the transfer itself with the aid of an intermediary bank, there will

103. *Evra Corp. v. Swiss Bank Corp.*, 522 F. Supp. 820 (1981); rev'd 673 F.2d 951 (1982).

be privity of contract between the customer and the intermediary bank which is employed by the customer's bank. However, if the customer initiating the funds transfer authorized the bank to affect a transfer, and the bank employed the services of a correspondent bank to do so, the exception to the rule regarding privity will not apply. However, since most eurocurrency transactions are effected by the means of correspondent banks that are employed by other banks to effect transfers, the general common law rule, which leans against finding privity of contract, will apply.

It is possible to argue that the above cases have not really altered the general rule with regard to privity of contract because they were decided on peculiar facts. For instance, it is possible to argue that in *Silverstein*, by expressly requesting a correspondent bank, the customer had impliedly requested its bank to create an agency relationship between it and the correspondent bank. In other words, by expressly selecting the correspondent bank, the transferor had taken away from its bank one of the attributes that would have made it a principal: the ability to choose and employ an agent.

Although the decision in *Evra Corp.* is more difficult to justify, it is possible to argue that the U.S. District Court found privity of contract because of its reliance on Article 4 of the Uniform Commercial Code. The Court held that under the common law of the U.S., there was privity of contract between a principal and its sub-agent.

It is possible to argue on the basis of the current state of the law, that as a general rule, the correspondent will not be held liable for breach of contract vis-a-vis the initiating customer if it is shown that: (1) the transferring bank was authorized to effect the transfer and not to create an agency relationship between the correspondent bank and its customer; (2) the transferring bank engaged the correspondent bank, on its own initiative to assist it in effecting the transfer; and (3) the transferring bank has not undertaken to provide the customer with another agent as a substitute to itself.

B. *Can the Correspondent Bank be Liable in Tort?*

Although it is generally accepted that the transferring bank will be held liable for the negligence or default of its agent, the liability of the correspondent bank in tort to the initiating customer is not at all certain. It has been argued, on the basis of an analogy with the law of bailment, that a correspondent bank can be held liable in tort to the customer of a transferring bank.

According to this approach, in the law of bailment, if "X" bails goods to "Y," who then makes a bailment of the goods to "Z," "Z" will be held liable for the loss or destruction of the goods.[104] However, it is not at all clear if this principle in the law of bailment can be applied to the law of agency. In *Balgamo* v. *Medeci*, an attempt to apply the approach to the law of agency failed.[105] Justice Walton, in addition to holding that the principal could not sue the sub-agent in contract because there was no privity, also held that because there was no duty owed by the sub-agent to the principal, no action could be maintained in tort. Consequently, the only right of action was in contract against the agent. This case may not be as decisive a determinant of the issue as it seems for various reasons. First, the reason why the principal could not sue the sub-agent in tort appears to have been procedural. The sub-agent was not named and served as a third party. Also it seems too broad a statement to state that no duty of care arises between the correspondent bank, which is a sub-agent, and the customer who initiates the transfer. The argument may be made that the customer is a person who the correspondent bank should foresee as likely to be affected by its acts and omissions if it does not exercise due care. Thus, a duty of care arises in this sense.

It has also been argued that correspondent bank is too remote a potential tortfeasor to be sued in tort. However, this argument is without any foundation in law. The issue of proximity in tort law is with regard to the injured party and not the tortfeasor. It is definitely certain, that a customer is a party who is reasonably foreseeable by the correspondent bank. Consequently, an action in negligence may be brought against it.

V. THE RELATIONSHIP BETWEEN THE RECEIVING/DESTINATION BANK AND THE BENEFICIARY-CUSTOMER

The existing case law suggests that when a receiving/beneficiary bank receives funds on behalf of its customer, the payee or beneficiary, it does so as an agent of such a customer. In *The Laconia*, Denning M.R. states, "[T]he paying bank is the agent of its own customer to make the payment, [and] the receiving bank is an agent of its customer to receive it."[106] However, although the argument that an agency relationship existing between the sending-customer and the transferring bank can be justified on the basis of the principles of the common law, it is difficult to

104. *See Lee Cooper Ltd. v. C.H. Jenkins & Sons Ltd.*, 3 W.L.R. 753 (Q.B. 1965); *Learoyd Bros. & Co. v. Pope & Sons Ltd.*, [1968] 1 All E.R. 811; *James Buchanan & Co. Ltd. v. Hay's Transport Services Ltd.*, 2 Lloyd's Rep. 535 (Q.B. 1972).

105. *Balsamo v. Medici*, [1984] 1 W.L.R. 951 (Ch. D. 1984).

106. *Mardorf Peach & Co. Ltd., v. Attica Sea Carriers Corp. of Liberia*, [1976] Q.B. 835 (C.A. 1986) [hereinafter *The Laconia*].

justify the agency argument when it comes to the relationship between the receiving/destination bank and the payee or beneficiary.

There are various reasons for this. First, the agency argument goes against the very basis of the law regarding the banker-customer deposit relationship. Cases such as *Foley* v. *Hill* and *Joachimson v. Swiss Bank Corp.* have laid down the often quoted principle that when a depositor places money in a bank account, the money so deposited constitutes a loan to the bank.[107] The bank becomes the borrower and as such it can use the funds as it sees fit. The relationship is not one of bailment. If this is the basis of the banker-customer deposit relationship, then when a bank receives money on behalf of its customer, it does not do so as an agent for its customer, but in its own right as a borrower.

As well, when a bank transfers funds into a nominated bank account, the transfer discharges any debt that the payor owed to the payee. The receiving bank then becomes the new debtor or takes the place of the original payor in respect of the sum that is owed to the payee. To argue then that the receiving bank is an agent of the payee, is to say that contrary to the basic principles of the banker-customer relationship, the payee and not the bank owns the funds deposited.

Another reason why the argument that the receiving bank is an agent to receive funds transferred to the payee is incorrect is that, such an argument is incapable of explaining the point in time when the receiving bank ceases to be an agent and becomes the owner of the funds which have been deposited into the account of the payee.

The better approach, it is submitted, is that when the receiving bank receives funds on behalf of its customer, unless there are circumstances which indicate a different kind of result, such a receiving bank receives the funds, not as an agent of the customer-payee, but in its own right as a borrower and consequently, an owner of the funds. This argument finds support in *Midland Bank* v. *Conway*.[108] In that case Mr. Justice Sachs held that although a bank received rent on behalf of its customer, who was a landlord, it did not do so as an agent for the customer. Rather, in receiving the rent, it did so in its capacity as a banker, by virtue of the relationship of banker and customer.

VI. THE RELATIONSHIP BETWEEN TRANSMITTING BANKS AND FUNDS TRANSFER NETWORKS

The above discussion shows that the interbank transfer of funds is

107. *Joachimson*, [1921] 3 K.B. 110, (Eng. C.A. 1921); *Foley*, 2 H.L. Cas. 28 (1848).
108. *Midland Bank, Ltd. v. Conway Borough Council*, 1 W.L.R. 1165 (Q.B. 1965).

essentially the interbank transfer of financial information. This information results in the alteration of information possessed by the concerned banks. The transmission of such financial information is made possible by the use of electronic funds transfer mechanisms, which are employed by network organizations. It will be recalled that these network organizations fall into two categories, namely, (1) those networks which are concerned with the transfer of financial information alone, and (2) those networks, which, in addition to being transferors of financial information, are also clearing and settlement systems.

What the existence of network organizations means is that instead of a bank sending a message directly to another bank; it sends it to the network which then transmits it to the receiving bank. As between the banks and the network organizations, the relationship is primarily contractual and is concerned with the actual communication of the financial information and messages, that is, the transfer and delivery of the information or message. The terms of the contract, which will usually be contained in the user handbook of the particular network organization, will, in most cases, govern aspects of the bank-network relationship such as, (1) the correct format to be used for the conveyance of the message or financial information; (2) security for messages and the prevention of fraud; (3) confidentiality of messages; (4) procedures to be followed to obtain redress in the event of network failure or malfunction; and,(5) the extent to which the network organization guarantees the accurate transmission of messages.

CONCLUSION

The above discussion has revealed clear differences between the common law on the banker-customer relationship and the evolving law on the eurobanker-customer relationship. As this article has shown, what one can describe as the traditional common law on the banker-customer relationship, as laid down in cases such as *Joachimson* v. *Swiss Bank,* is based on the notion that money is cash or *specie*, and a deposit of money in a bank is a deposit of cash or *specie.* This notion influences the common law approach with respect to other aspects of the banker-customer relationship. For example, the law with respect the place of repayment of a deposit, and the law with respect to the proper law of the deposit. As this article has shown, applying the traditional common law approach to the relationship between a eurobank and its customer gives rise to problems for several reasons: (1) deposits of eurocurrency are not deposits of *specie* or physical cash, but book entries; (2) the transaction straddles a number of jurisdictions; and (3) the place where the book entries representing the deposit are made, is not necessarily the place where the deposit is repaid.

These differences do not augur well for consistency and certainty in the law. There is thus the need for the courts to infuse some clarity into the law.